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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 413

GEORGIA RAIL ROAD AND BANKING COMPANY,
Appellant,

vs.

DOWNING MUSGROVE, WHO IS STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EUGENE COOK,
Attorney General of Georgia;
CLAUDE SHAW,
Deputy Assistant Attorney General of Georgia;
VICTOR DAVIDSON,
Special Assistant Attorney, Counsel for Appellee.

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GEORGIA RAIL ROAD AND BANKING COMPANY,
Appellant,

vs.

DOWNING MUSGROVE, WHO IS STATE REVENUE COMMISSIONER OF THE STATE OF GEORGIA,
Appellee

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Appellee, Downing Musgrove, State Revenue Commissioner of the State of Georgia, believing that the matter set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this, his statement, in opposition of Appellant's statement as to the jurisdiction. Appellee includes herein his motion to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of Georgia on the ground that the questions raised on behalf of Appellant are so unsubstantial as not to need further argument.

Appellee asserts that the unsubstantial character of the grounds stated by Appellant is so apparent on the face of the record as to warrant the court in summarily disposing of the case at this stage of the proceedings.

The matters here relied on by Appellee are more particularly stated below.

Appellant bases its appeal on an erroneous assumption that the Supreme Court of the United States will assume jurisdiction on a decision of a State Court construing a State Statute providing for certain actions which may be filed in State Courts. The petition of Appellant against Appellee was based on a new statute, that of 1945 authorizing the granting of declaratory judgments in certain cases. The decision of the Supreme Court of Georgia ordered the petition dismissed on the grounds that declaratory judgment was not Appellant's remedy and held that the petition was an action against the State of Georgia and that the State of Georgia had not given its consent to be sued in such actions.

The appeal should, therefore, be dismissed because it is a well-settled rule of decisions that the United States Supreme Court will not take jurisdiction over such State Court decisions.

Although it is not stated in the opinion written by the Supreme Court of Georgia in the case, yet, it is clearly evident that the court had several grounds which would have required a dismissal of Appellant's petition.

(A) In Appellant's petition it claims that it might not have any other remedy at law other than this method in which to resist the payment of the taxes described in the petition. However, it is clearly evident that the laws of Georgia provided ample remedies for such defenses as Appellant might have.

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Under the Act of 1943, pp. 204, 206, it is specifically provided that "all final rulings, orders and judgments of the State Revenue Commissioner shall be subject to appeal and review" in the Superior Court. We quote the following from the same Act:

> "Provided, however, that nothing herein contained and no provision of this law (Sections 92-8426 (d) to 92-8426 (f) shall be construed to deprive a taxpayer against whom an execution for taxes has been issued under an assessment by the State Revenue Commissioner of the right to resist enforcement of the same by affidavit of illegality."

Code Section 92-8426 (e) provides for plaintiff an adequate remedy at law—arbitration and appeal to the Superior Court.

Code Section 92-8445 specifically forbids injunction in such cases as follows:

> "Appeal from Commissioner's findings; petition; supersedeas; evidence; decision.—The Commissioner's assessments shall not be reviewed except by the procedure hereinafter provided. No trial court shall have jurisdiction of proceedings to question such assessments, except as in this Chapter provided."

The foregoing was construed in *Forrester, Revenue Commissioner* v. *Pullman Company,* 66 Ga. App. 745.

> "The method of reviewing the tax assessment of the Commissioner of Revenue is prescribed by our Code, 92-8446, and the procedure therein is exclusive, and no trial court shall have jurisdiction of proceedings to question such assessments, except as in this chapter provided."

Clearly, Appellant has ample remedy at law and under numerous decisions of the Supreme Court of Georgia declaratory judgment cannot be invoked whenever there are other remedies available. See *Mayor and Council of Athens* v. *Gerdine*, 42 S.E. (2d) 567, decided May 19, 1947, and citations therein. These decisions would have required a dismissal of the petition regardless of whether the Act had provided for declaratory judgments against the State.

(B) Appellant, in its petition, bases its right of action on an alleged contract which it claims to have entered into with the State of Georgia by the Act of the Legislature of 1833, in which the State granted perpetual tax exemption. Although it alleges that the State is bound by this contract, yet, nowhere in its petition does it allege that the railroad company has complied with its part of the contract and built the railroads specified and required by the original Act of 1833. The Supreme Court of Georgia would have been authorized to take judicial cognizance of the fact that this railroad has not complied with its contract and has not built all the railroads required by its charter. The demurrers raised the question of Appellant's failure to allege compliance with its contract and the Supreme Court of Georgia would have been authorized to dismiss the petition on this ground.

(C) Appellant, in its petition, pleaded *res judicata* in the decisions of *Wright* v. *Georgia Railroad and Banking Company*, 216 U. S. 420 and also in the case of *State* v. *Georgia Railroad and Banking Company*, 54 Ga.423. It will be noted, however, that the case in the 216 U. S. held that judgment for taxes for one year is not *res judicata* as to taxes for other years, basing its decision on the case of *Georgia Railroad and Banking Company* v. *Wright, Comptroller Gen-*

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eral, 124 Ga. 596. These two decisions are in harmony with the decision of the United States Supreme Court handed down in April of 1948, holding that judgment for taxes for one year is not *res judicata* as to other years.

Appellant's petition calls attention to the Constitution of Georgia of 1945 which revokes such tax exemption as set forth in the petition.

(D) Appellant's petition asks for an injunction against *ad valorem* taxation of the property of Appellant, claiming it to be exempt from all taxation by virtue of the following provision of its charter:

> "The stock of said company and its branches shall be exempt from taxation for and during this term of seven years from and after the completion of the said railroads or any one of them: and after that, shall be subject to a tax not exceeding one half per cent per annum on the net proceeds of their investments."

It will be noted from the foregoing that the statute provided a stock exemption and not an *ad valorem* property tax exemption on the tangible assets of the corporation. While previous court decisions have construed stock tax exemption to be synonymous with property tax exemption, yet, such is not always the construction given it by the courts. In some instances it has been claimed that income tax is an indirect tax on the property itself. However, that is not the prevailing line of decisions of today. The same would hold good as to whether a stock tax exemption would be the same as a property tax exemption.

WHEREFORE, Appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need

further argument or further consideration of this Court and Appellee respectfully moves the court to dismiss this appeal, or in the alternative to affirm the judgment of the Supreme Court of Georgia.

This 21st day of October, 1948.

EUGENE COOK,
Attorney General;
CLAUDE SHAW,
Deputy Asst. Attorney General;
VICTOR DAVIDSON,
Special Asst. Attorney General for this Case;
Attorneys for Downing Musgrove, State Revenue Commissioner.

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